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No. 86-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KAISER CEMENT & GYPSUM CORPORATION,

Petitioner,

—v.—

FISCHBACH & MOORE, INC. and THE HOWARD P. FOLEY CO.,

Respondents.

BRIEF OF RESPONDENT FISCHBACH & MOORE, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 20, 1986

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QUESTION PRESENTED

Did the lower courts correctly conclude, based on the totality of the circumstances and the record, that petitioner had failed to show the existence of a genuine issue for trial on the question whether respondents' alleged bidrigging was the proximate cause of any injury to petitioner, in light of the fact that the price actually paid by petitioner was based on an arbitration award that was not affected by any alleged bidrigging?*

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* Pursuant to Rule 28.1 of this Court, Respondent Fischbach and Moore, Inc. states that it is a wholly owned subsidiary of Fischbach Corporation. The only other subsidiary of Fischbach Corporation (other than wholly owned subsidiaries) is Fischbach and Moore of Canada, Ltd. All of the subsidiaries of Fischbach and Moore, Inc. are wholly owned. Neither Fischbach Corporation nor Fischbach and Moore, Inc. have any affiliates.

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STATEMENT

In 1979, petitioner Kaiser Cement & Gypsum Corporation ("Kaiser") sought bids for electrical construction work at its Permanente, California cement plant. Three companies submitted bids, including respondents Fischbach and Moore, Inc. ("Fischbach") and The Howard P. Foley Company ("Foley").[1] Following negotiations between Kaiser and Foley, Kaiser awarded the contract to Foley.

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1 On May 15, 1986, The Howard P. Foley Company and various affiliated entities filed for protection from creditors under Chapter XI of the Bankruptcy Act in the U.S. Bankruptcy Court for the Eastern District of Virginia, Docket No. 86-00874A.

The contract provided for Foley to complete the electrical construction work within a ten and one-half month period. Kaiser assumed the responsibility of coordinating the electrical construction work being done at the site. As a result of Kaiser's failure adequately to perform its obligation to coordinate the various contractors, Foley required twenty-four months to complete the work. As the court below noted, "Foley anticipated expending 67,000 manhours but actually used 216,000." (Pet. App. A-2-3).

The contract provided for total payments to Foley of approximately $4,800,000; Kaiser, in fact, paid Foley that amount plus an additional $3,260,000 during the course of the contract "to compensate [Foley] for numerous change orders." (Pet. App. B-1). Nonetheless, Foley's actual costs exceeded the amounts it had received and so it sought arbitration pursuant to the terms of the contract. On November 23, 1981, Judge William D. Schwarzer of the United States District Court for the Northern District of California ordered that matter as well as various related matters to be arbitrated.

The arbitrators held fourteen days of hearings. Following the close of evidence, "the arbitrators requested an audit by Coopers & Lybrand in order to establish the actual costs to Foley as they were recorded in the Foley project ledgers and files." (Pet. App. B-2). On May 31, 1983, Coopers & Lybrand submitted its audit report to the arbitrators, finding that Foley's costs totalled $9,511,899 and that the total paid by Kaiser to Foley was $8,064,041. (Pet. App. D-2). That same day the arbitrators issued their decision awarding Foley $3,786,194 additional compensation. The award was based on Foley's actual costs, plus 15 percent for overhead and profit.

Foley moved the district court to confirm the award. In his Declaration in Opposition to the Petition to Confirm the Arbitration Award, Kaiser's counsel, Mr. Duffy, stated that "cost plus 15% was the award."[2] Subsequently at the hearing

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2 In the arbitration, Kaiser's own expert calculated his "correct" bid by using estimated cost-plus 15 percent for overhead and profit. (CR

on the motion to confirm, Duffy advised the court that the arbitrator's calculation was made "apparently . . . simply to take the total costs on the job and put some add-ons around it and made that award." (Pet. App. D-8).[3] Kaiser argued that the audit was improperly performed and that the arbitrators had erroneously considered certain evidence. Judge Schwarzer rejected these arguments and confirmed the award on August 5, 1983; no appeal of the district court's decision was taken by Kaiser. (Pet. App. C-9).

On August 2, 1983, Kaiser filed the present action. It alleged that the bids were rigged and that the contract price was inflated.[4] Kaiser subsequently filed a motion with Judge Schwarzer requesting the district court to set aside its judgment and vacate the arbitration award pursuant to Fed. R. Civ. P. 60(b). That motion was denied on October 23, 1984, in an opinion set out in Appendix D to the Petition. The court concluded that the purportedly newly discovered evidence did not meet the standard of Rule 60(b). In so holding, the court concluded that Kaiser failed to demonstrate that the evidence was of material and controlling nature. The purported evi-

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152: Exhibit 7) ("CR" refers to the District Court Clerk's Docket Control Number and was used as the record reference in the court of appeals.)

3 The Coopers & Lybrand audit did not provide for amounts to cover workmen's compensation and self-owned equipment expenses. The arbitrators stated that they would "adjust those costs [as determined by Coopers & Lybrand] for Workers' Compensation and self-owned equipment, which two costs are not in the Foley records." (CR 152: Exhibit 8). Thus, the arbitrators apparently determined these two costs to total $792,967 and then added that amount to the total of direct job costs as determined by Coopers & Lybrand to yield total costs to Foley of $10,304,866. They then added 15 percent to cover overhead and profit and reached a value of $11,850,595, representing the total of the payments and award received by Foley.

4 In contrast, during the arbitration one of Kaiser's principal contentions was that Foley had deliberately *underbid* its costs and that, therefore, Kaiser was not responsible for the overruns as performed. Thus, *Kaiser's* expert analyzed the bid and determined that Foley had underbid by more than $1,320,000 or 21 percent. (CR 152: Exhibit 7).

dence dealt with alleged fraudulent documents relating to the Foley estimate. The court concluded that this evidence was "tangential at best" because the arbitrators' award was not based on the original cost estimate, but rather on Foley's total costs plus a percentage for overhead and profit. Thus, evidence as to the estimate or the bid was not material to the award. This decision was affirmed by the Ninth Circuit in an opinion set out in Appendix C to the Petition.

Subsequently, respondents moved for summary judgment on Kaiser's antitrust and related claims on the ground (among others) that, even if the original bids had been rigged as Kaiser alleged, any bidrigging could not have caused injury to Kaiser. Judge William H. Orrick, Jr. (former Assistant Attorney General in charge of the Antitrust Division of the Department of Justice) considered the evidence submitted by respondents and concluded (as had Judge Schwarzer) that the arbitrators' award was based on a cost-plus formula. Since the amount which Kaiser ultimately paid to Foley was calculated on a cost-plus basis, Judge Orrick determined that the original bids were "irrelevant." (Pet. App. B-7). The arbitrators had "determined the actual cost of Foley's work and the fair compensation to which Foley is entitled for that work"; summary judgment was appropriate because in these circumstances "there [could] be no damage to Kaiser." (Pet. App. B-9).

The court of appeals affirmed unanimously. While it noted that the question "of the preclusive effect of an arbitration award in subsequent antitrust litigation" was raised by Kaiser, it did not find it necessary to consider that issue. (Pet. App. A-5). Instead, it based its affirmance on Kaiser's failure to show injury. (Pet. App. A-8). It held that the district court properly concluded that "the arbitrators awarded Foley an amount they considered to be fair without regard to any bidrigging." (*Id.*) Since the amounts which Foley received from Kaiser were not affected in any way by the allegedly inflated bids, there could be no antitrust injury and summary judgment was affirmed.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below rests on unremarkable principles of antitrust law and the determination, in which two district judges and the three members of the court of appeals panel concurred, that there was no genuine issue of fact. Further review is not warranted.

While Kaiser attempts to paint this case as one involving a conflict between the antitrust laws and arbitration, there is simply no basis in the court of appeals' opinion to support such a reading. Rather, the court explicitly held that it did not need to consider the question of collateral estoppel and potential conflict with arbitration in order to affirm the summary judgment for respondents. Simply put, all five of the lower court judges who have reviewed Kaiser's claims with respect to the arbitration award have concluded, consistently with Kaiser's original position, that the arbitrators' award was unrelated to the original bid or estimate. Rather, the award was calculated by taking Foley's actual costs and adding 15 percent for overhead and profit. Since the amount paid by Kaiser and received by Foley was factually unrelated to the original bid and estimate, Kaiser was unable to show any causal link between the alleged bidrigging and the amount it paid for the electrical construction work. Thus, Kaiser could not establish any actual "impact" from the alleged bidrigging. Summary judgment was appropriately granted.

1. Kaiser does not dispute that an antitrust plaintiff must establish causation of injury. As the court of appeals noted, "[t]o prevail, an antitrust plaintiff must establish a violation of the antitrust laws and an actual injury attributable to something the antitrust laws were designed to prevent." (Pet. App. A-7, citing *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)). As the Second Circuit recently stated, "an essential element in plaintiffs' claim is that the injuries

alleged would not have occurred *but for* [defendant's] antitrust violation." *Argus, Inc.* v. *Eastman Kodak Co.*, Docket No. 85-7549 (2d Cir., September 8, 1986) (slip op. at 5600) (emphasis in original). Thus, Kaiser and respondents agree that Kaiser can only prove antitrust damages to the extent that the price it actually paid exceeded the price it would have paid absent the alleged conspiracy. (Pet. 9). Further, this Court has recognized that a plaintiff must prove "the fact of damage" with specificity. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).[5]

2. Kaiser relies, instead, on two purported areas of error in the lower courts: first, Kaiser contends that because the district court referred to Foley's receiving "fair market value" for its work in support of its grant of summary judgment, the court applied an incorrect theory of antitrust damages; second, Kaiser contends that the district court erroneously granted preclusive or collateral estoppel effect to the arbitration award on the issue of antitrust damages. In fact, the court of appeals made neither of these purported holdings.

a. The court of appeals' decision correctly applied the accepted standard of determining whether antitrust damages have been caused. That court, as well as the district court, simply concluded that the arbitrators' award—the only "price" that Kaiser paid for the work done—was causally unrelated to the original, allegedly rigged, bid. Since that award was based on Foley's audited costs rather than the bid, the alleged conspiracy could have had no impact on that "price." In the words of the legal authority upon which Kaiser relies, absent the alleged conspiracy, Kaiser "would have paid" the same price. Even if the Foley bid had been reduced, the arbitrators

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5 Kaiser errs when it contends that "[t]he idea that a bid-rigging conspiracy can exist without the plaintiff being damaged is plainly counterintuitive" (Pet. 9). For example, in *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 414 (5th Cir. 1985), the court affirmed a jury verdict finding of no damages where the jury also "found in plaintiffs' favor that a conspiracy to fix prices existed."

would still have been required to determine what amounts to award Foley on its claims given the vast delay caused by Kaiser's conduct. Since the arbitrators did not, in fact, use the original bid as a reference in their determination (which is not surprising given the fact that the job took three times as many manhours to complete as was reasonably expected), the lower courts concluded that even a lower bid would not have affected the amount awarded by the arbitration panel.[6]

Thus, the court of appeals' decision was based on accepted principles of causation and antitrust injury.[7] The references in the district court's opinion to "fair market value" were clearly meant to refer to the arbitrators' reasoning as being unrelated to the original bid; indeed, the court of appeals' decision recognizes this very point: "Kaiser was not injured because the arbitrators awarded Foley an amount they considered to be fair without regard to any bidrigging." (Pet. App. A-8). No novel question of antitrust damages is presented by the Petition.

b. Nor has Kaiser identified any application of collateral estoppel principles by the court of appeals. Significantly, the court of appeals held that it was *not* considering the preclusive effect of the arbitration award. (Pet. App. A-5). Nowhere does Kaiser explain why this plain statement of the court of appeals is wrong. Instead, Kaiser restates the very arguments it made in the court of appeals and which the court of appeals concluded

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6 Since Kaiser argued throughout the arbitration that Foley had intentionally underbid the job, the arbitrators' award of cost plus 15 percent for overhead and profit rejected even a tangential linkage between the award and the level of profitability in the original contract. Thus, even if a "competitive" bid by Foley would have been below cost, the arbitrators' award would not have been affected. Kaiser's discussion of the bidding process at page 10 of the Petition is simply irrelevant.

7 E.g., *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348 (1986); *THI-Hawaii, Inc.* v. *First Commerce Financial Corp.*, 627 F.2d 991 (9th Cir. 1980).

it did not have to reach in order to affirm the summary judgment for respondents.

The court of appeals' decision, in fact, rests on the most elementary principles of proximate cause. The court merely concluded that the payments made by Kaiser to Foley were as set out in the arbitrators' award. The court relied on the uncontested fact of the arbitration and the subsequent award. No factual finding made by the arbitrators was given preclusive effect. Rather, the lower courts determined that the arbitrators' award was not based on the original bid or contract, but rather on actual costs and was, therefore, not affected by any alleged overcharge in the original bid. The arbitrators did not find that there was no bidrigging; their award was "an amount they considered to be fair without regard to any bidrigging." (Pet. App. A-8). Thus, Kaiser was not able to show injury from the purported bidrigging.

Kaiser suggests that the lower courts somehow acted improperly in determining the method by which the arbitrators calculated the award. Kaiser fails to recognize, however, that the crucial issue here is whether the amount Kaiser in fact paid to Foley was affected by the alleged bidrigging. Since the amount actually paid was not the amount bid but the amount determined by the arbitrators, the courts below had to decide whether the arbitration award could have been affected by bidrigging. Accordingly, the courts below had no choice but to determine the basis for the award.

With regard to the conclusion that the award was not affected by any alleged bidrigging but, rather, was based on Foley's costs plus 15 percent, there was no genuine issue of fact. It is true, as Kaiser notes, that the arbitration panel did not explicitly state the basis for calculating its award—as is usual in arbitrated matters. Yet, all the evidence in the record points to the conclusion that the award was based on cost plus 15 percent, and Kaiser failed to offer evidence of any alternative basis on which the award could have been made. In fact, as both of the district judges who considered the arbitrators'

award and the court of appeals' panel unanimously found, Kaiser itself had originally contended in opposing confirmation of the award that the arbitrators had used a "cost-plus" basis for rendering the award; indeed a "cost-plus" award was critical to Kaiser's position at that time since Kaiser contended that the audit of Foley's costs was erroneous and, therefore, prejudicial. Both district courts carefully considered all the evidence as to the basis of the arbitrators' calculations and concluded that the only basis for the amount awarded was cost plus 15 percent. The court of appeals unanimously agreed. Certainly, the lower courts' determination that there was no genuine issue of fact as to the basis for the award, based on the totality of the circumstances and the record which included Kaiser's pre-antitrust litigation interpretation of the award, fails to raise any important legal issue.

As this Court stated in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. at 1356 (1986), plaintiff "must show more than a conspiracy in violation of the antitrust laws; [it] must show an injury to [it] resulting from the illegal conduct." Petitioner failed to establish a "genuine issue for trial" and summary judgment was properly ordered for respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 20, 1986

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